

HOFFMAN, Senior Judge

Petitioner-Appellant Donald Marshall (“Marshall”) appeals from the trial court’s order summarily denying Marshall’s petition for habeas corpus relief. We affirm.

Marshall was sentenced to a term of thirty years for his conviction of attempted murder. After serving fifteen years of his sentence, during which period Marshall unsuccessfully sought post-conviction relief, Marshall was released to parole in October of 2005. On May 2, 2006, Marshall was arrested on a parole violation warrant. Marshall’s preliminary hearing was held on May 11, 2006. At that hearing Marshall admitted that he had entered a plea of guilty to the offense of operating while intoxicated. One of the special stipulations of Marshall’s parole was that he not use, consume, or possess alcohol or beverages containing alcohol. The use, consumption, or possession of alcohol or beverages containing alcohol is a violation of Rule 10 of Marshall’s parole.

On June 12, 2006, Marshall received notice of a parole violation hearing. The hearing was held on June 20, 2006. At the hearing, the Parole Board determined that Marshall violated the terms of his parole, revoked his parole, and determined that Marshall would be “assessed a period” until his next appearance before the Parole Board. Marshall next appeared before the Parole Board in December of 2006, and again, in April of 2007. The Parole Board, on both occasions, denied Marshall’s requests to be released to parole.

On July 9, 2007, Marshall filed a verified petition for writ of habeas corpus alleging that he was being unlawfully restrained of his liberty by Respondent-Appellee Walter Martin (“Martin”), Superintendent of the Miami Correctional Facility. In his pleading, Marshall alleged that his restraint was illegal because he never received a copy

of the written evidence the Parole Board relied upon to revoke his parole. On August 2, 2007, Martin filed a motion to dismiss Marshall's petition. On August 15, 2007, Marshall filed a response to Martin's motion to dismiss. On August 30, 2007, Martin filed a reply in response to Marshall's reply. On October 4, 2007, the trial court granted Martin's motion for summary judgment. The trial court treated Martin's motion to dismiss as a motion for summary judgment because the motion to dismiss cited to information outside the pleadings. Marshall timely filed his notice of appeal from the trial court's denial of his petition for writ of habeas corpus.

The trial court issued findings of fact and conclusions of law in denying Marshall's petition for writ of habeas corpus. Sua sponte findings control only as to the issues they cover. *Hannis v. Deuth*, 816 N.E.2d 872, 875 (Ind. Ct. App. 2004). A general judgment will control as to the issues upon which there are no findings. *Id.* A general judgment entered with findings will be affirmed if it can be sustained on any legal theory supported by the evidence. *Id.*

When the trial court has made findings of fact, a court on review will examine the sufficiency of the evidence using a two-step process. *Id.* First, the evidence must support the trial court's findings of fact. *Id.* Second, the findings of fact must support the trial court's conclusions of law. *Id.* A court on review will set aside the findings only if they are clearly erroneous. *Id.* Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference. *Id.* A judgment is clearly erroneous if it applies the wrong legal standard to properly found facts. *Id.*

It is not this court's function on review to reweigh the evidence or reassess the credibility of the witnesses. *Id.* Rather, our review involves a consideration of the evidence that supports the judgment and the reasonable inferences to be drawn therefrom. *Id.* Before this court makes the determination that a finding or conclusion is clearly erroneous, our review of the evidence must leave us with the firm conviction that a mistake has been made. *Id.*

Marshall started the present action by filing a petition for a writ of habeas corpus. Indiana Code §34-25.5-1-1 provides as follows:

Every person whose liberty is restrained, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of the restraint, and shall be delivered from the restraint if the restraint is illegal.

The purpose of the writ of habeas corpus is to bring the person in custody before the court for inquiry into the cause of restraint. *Partlow v. Superintendent, Miami Corr. Facility*, 756 N.E.2d 978, 980 (Ind. Ct. App. 2001). A petitioner is entitled to habeas corpus relief only if he is entitled to immediate release from unlawful custody. *Id.* Moreover, a petitioner may not file a writ of habeas corpus to attack his conviction or sentence, and such an attack should be filed as a petition for post-conviction relief. *Id.* Habeas corpus relief is not available to a petitioner whose legal sentence has not expired. *See Hawkins v. Jenkins*, 374 N.E.2d 496, 498 (Ind. 1978).

Marshall argues that he was denied the minimum requirements of due process regarding his parole revocation when he was not provided with a copy of a written statement of the findings of fact and evidence relied upon by the Parole Board to revoke his parole. Marshall contends that he is entitled to immediate release because of that

alleged procedural defect and attempts to support his argument by citing to *Morrissey v. Brewer*, (1972) 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484.

Marshall's has waived his claims by failing to pursue appropriate post-conviction review of the parole revocation decision. A parole revocation is a type of post-conviction action. Indiana Post-Conviction Rule 1(1)(a)(5) provides in relevant part that:

Any person who has been convicted of, or sentenced for, a crime by a court of this state, and who claims that his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint may institute at any time a proceeding under this Rule to secure relief.

The essence of Marshall's complaint is that his parole was unlawfully revoked. However, Marshall's parole was revoked on June 20, 2006. Marshall could have sought an appeal of the parole revocation decision. However, Marshall needed to pursue that in a timely manner after his revocation, and he did not. Instead, Marshall waited and pursued a petition for writ of habeas corpus. Therefore, that post-conviction relief option has been waived because it is too late for that option.

Despite the fact that Marshall has waived his right to seek appellate review of the revocation of his parole, we address Marshall's claims on the merits.

In *Morrissey*, the United States Supreme Court set forth specific guidelines as minimum requirements for due process in parole revocation hearings. "They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);

(e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.” 408 U.S. at 489. Those minimum requirements are spelled out in Ind. Code §11-13-3-9(a)(1-4) and Ind. Code §11-13-3-10(d), and in relevant part pertaining to the case at bar at Ind. Code §11-13-3-9(a)(4) and Ind. Code §11-13-3-10(d).

A review of the record reveals that, ultimately, Marshall was provided copies of those documents and statements attached to Martin’s motion to dismiss Marshall’s petition. Therefore, Marshall has already received the documents he alleges he was denied. The crux of Marshall’s argument here is whether the alleged procedural defect requires dismissal of the petition to revoke his parole thereby entitling Marshall to immediate release.

Marshall admitted at his hearing that he committed the offense of operating while intoxicated while he was on parole. Therefore, his parole was properly revoked. Consequently, Marshall is not entitled to release because of the substance of his parole revocation. The trial court correctly determined that the operating while intoxicated conviction necessarily includes the consumption of alcohol by Marshall. Consumption of alcohol was a violation of the special conditions of Marshall’s parole. Marshall argued that if he had the paperwork he could have challenged the trial court’s finding. Based upon his own admission, and the logical inferences that flow from his subsequent conviction, Marshall had no argument available to him to challenge the trial court’s finding.

The remedy for not receiving the written statement was an administrative one. Marshall should have made a request for the written statement from the Parole Board. Here, the record reflects that Marshall appeared before the Parole Board on at least two subsequent occasions without requesting the documents. Therefore, from this standpoint, his argument is waived.

There is nothing in the parole statutes detailing a time frame for providing the statements to a parolee. Here, taking the facts most favorably to Marshall, he received the written statements attached to the motion to dismiss his petition. There is no evidence to support or refute Marshall's contention that he did not receive the written statements prior to that time. Better practice would be to provide the written statement to the parolee sooner than later. However, there is no statutory time frame in place. Moreover, there is no statutory requirement that a petition to revoke parole be dismissed for providing the statements "late."

Marshall argued that one of the documents referred to his original offense as "Murder" instead of "Attempted Murder." He claims to make a showing of prejudice from failure to receive his paperwork based upon that error. This argument fails because the document to which he refers, the December 19, 2006 report of investigation and decision of parole board, was before the Parole Board after the hearing in question. The documents before the Parole Board in June of 2006 correctly listed his offense as "Attempted Murder." Furthermore, the subsequent April 17, 2007, parole board hearing and documentation correctly referred to his crime as "Attempted Murder." Therefore, it appears that the mistake on the December 19, 2006 report had no bearing on the original

decision to revoke his parole and does not serve as a basis for relief from the Parole Board's decision.

Marshall was present at his parole revocation hearing, received notices of the dates of the hearings, admitted to the offense/violation, and received notice of the Parole Board's decision. Therefore, Marshall's petition for writ of habeas corpus was properly denied.

Marshall waived his argument about receipt of the written statements by failing to request the documents at subsequent Parole Board hearings. Marshall has failed to utilize the appropriate post-conviction process to seek appellate review of the revocation of his parole. For all of those reasons, the trial court's decision is affirmed.

KIRSCH, J., and BARNES, J., concur.